

2006 JUDICIAL ELECTIONS SEMINAR & WEBCAST



***CAMPAIGN TIMING, MANAGEMENT OF CAMPAIGN FUNDS,
ADVERTISING AND DEBATES***

Faculty

Ms. Dawn M. Evans
Director of Professional Standards
State Bar of Michigan
(517) 346-6328

ETHICS OPINIONS

- ◆ C-219
- ◆ C-222
- ◆ JI-004
- ◆ JI-082

Ethics opinions C-219, C-222, JI-004, and JI-082 are overruled by the White decision, and are no longer valid.

**JI-131
February 7, 2005**

SYLLABUS

Judicial candidates may announce their views on disputed legal and political issues during a campaign as the First Amendment protects such speech. A candidate may not make a pledge or promise during a campaign of conduct in office other than the faithful and impartial performance of the duties of the office.

Opinions C-219, C-222, C-227, C-237, JI-004, JI-27, and JI-82 are reviewed by the committee sua sponte in light of Republican Party of Minnesota v White, 536 U.S. 765, 122 S.Ct. 2528 (2002).

Ethics opinions C-219, C-222, JI-004, and JI-082 are overruled by the White decision, and are no longer valid.

References: C-219, C-222, C-237, JI-004, JI-027, JI-082, Republican Party of Minnesota v White, 536 US 765 (2002), MCJC 7A, MCJC 7B.

TEXT

The Committee has asked sua sponte, whether Judicial Ethic Opinions C-219, C-222, C-227, C-237, JI-004, JI-027, and JI-082 are valid in light of Republican Party of Minnesota v White, 536 US 765, 122 S Ct 2528 (2002) (hereinafter referred to as *White*). In *White*, the U.S. Supreme Court addressed a Minnesota Supreme Court Canon that prohibited candidates for judicial election from announcing their views on disputed legal and political issues. That canon stated a “candidate for a judicial office including an incumbent judge” shall not “announce his or her views on a disputed legal or political issues”. The canon was based on Canon 7B of the 1972 American Bar Association Model Code of Judicial Conduct commonly known as the “announce clause”. *White*, struck down the Minnesota canon holding that it was in violation of the First Amendment. The majority opinion applied the strict-scrutiny test, which mandates that any such rule be (1) narrowly tailored, to serve (2) a compelling state interest. *Id.* To show that such a canon is narrowly tailored, the proponents of such a rule must demonstrate that it does not “unnecessarily circumscribe protected expression.” *Id.*

In striking down the “announce clause” the Court failed to find a compelling state interest served by a narrowly tailored rule in either of the states articulated interest, those being: preserving the impartiality of the state judiciary and/or preserving the appearance of impartiality of the state judiciary.

The Michigan Code of Judicial Conduct does not contain an “announce clause”. Rather, Michigan has adopted the so-called “pledge or promise” clause. Michigan’s “pledge or promise” clause provides:

“MCJC 7 A Judge or a Candidate for Judicial Office Should Refrain from Political Activity Inappropriate to
Judicial
Office

B. Campaign Conduct

(1) A candidate, including an incumbent judge, for a judicial office:

....

(c) should not make pledges or promises of conduct in office other than the faithful and

impartial performances of the duties of the office;”

It is important to note that the majority opinion in *White*, specifically declined to address the “pledge or promise” clause. The Court distinguished the two types of clauses and stated:

“We know that “ announcing views ” on an issue covers much more than promising to decide an issue a particular way. The prohibition extends to the candidates mere statement of his current position, even if he does not bind himself to maintain that position after election. All the parties agree this is the case, because the Minnesota Code contains a so called “pledges or promises” clause, which separately prohibits judicial candidates from making “pledges or promises of conduct in office other than the faithful and impartial performance of the duty of that office,” ibid.—a prohibition that is not challenged here and on which we express no view.”

That having been said, the *White*, majority opinion does give guidance that we should go to great lengths to protect campaign speech. The court stated:

“Moreover, the notion that the special context of electioneering justifies an abridgment of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. “[D]ebate on the qualifications of candidates” is “at the core of our electoral process and of the First Amendment freedoms,” not at the edges. Eu, 89 U.S., at 222-223, 109 S.Ct. 1013 (internal quotation marks omitted). “The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.” Wood v. Georgia, 370 U.S. 375, 395, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962). “It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign.” Brown, 456 U.S., at 60, 102 S.Ct. 1523 (internal quotations marks omitted). We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.” Id.

Thus, while the Michigan “pledge or promise” clause is presumed constitutionally valid and enforceable at the present time, in light of *White*, such a free speech prohibition must be narrowly construed and cautiously applied to campaign speech. It is within this framework that each of the at-issue opinions is reviewed.

Opinion C-219, February 15, 1980

In Opinion C-219, the committee was asked to determine whether a District Court Judge’s proposed campaign slogan “A strict sentencing philosophy! A hard working man!” was proper. The slogan was to appear in advertising materials disseminated during the election campaign. The opinion stated that the use of such a slogan was prohibited under Canon 7 as there was a belief that this phrase standing alone created an impression of possible bias or partiality in the candidates proposed sentencing practices. The opinion concluded that irrespective of whether the phrase “a strict sentencing philosophy” in campaign literature constituted a pledge or promise, its use was not permissible.

In light of *White*, the opinion as it stands is not constitutionally valid. Under *White*, only speech which constitutes a “pledge or promise” of conduct in an office other than the faithful and impartial performance of duties may be prohibited. C-219 fails to address this critical issue.

Whether the phrase “strict sentencing philosophy” constitutes an impermissible pledge or promise must be gauged at least in part, by the meaning of the phrase. As with all campaign rhetoric, this phrase is “dated” reflecting perceived issues during the campaign in which it was proposed. Presumably at the time, it was meant to reflect a harsh versus lenient approach to criminal sentencing. However, with the advent of relatively strict sentencing guidelines in Michigan, it is not entirely clear what the current meaning of “a strict sentencing philosophy” would be in a campaign. One possible current interpretation of the phrase would be a proper statement by a candidate to strictly follow the sentencing guidelines in Michigan. Whatever the current meaning of the phrase, it does not rise to the level of an impermissible pledge or promise. Accordingly, this opinion is no longer valid under *White*, *Id.* It is merely an expression of philosophy and as such, an announcement by a candidate of his views on a political/legal issue.

Opinion C-222, February 26, 1982

Ethics Opinion C-222 opined that a county bar association could not circulate a questionnaire requesting judicial candidates to agree or disagree on various legal issues that had been already decided upon by the courts of last resort. The questionnaire at issue listed seventeen issues and asked the candidates to indicate their philosophical agreement or disagreement with the Court's decisions. In stating that such a questionnaire and responses would be unethical, the opinion states "... the candidate should not announce conclusions in advance on issues on which he or she will be called upon to decide if elected."

Opinions C-222 is clearly invalid under the White, decision. The prohibition enunciated in C-222 goes far beyond the scope of prohibited pledges and promises. It rather prohibits a candidate from expressing opinions that constitute protected speech under the First Amendment. C-222 is no longer a valid statement of the law as candidates are free to announce their opinions of disputed legal and political issues.

Opinion C-227, November 1982

Ethics Opinion C-227 opined that a candidate for the State Supreme Court may criticize the majority portion of a divided opinion of that court and the legal philosophy that underlies that portion of the opinion. The specific facts of White, involved this same issue of criticism of prior Minnesota Supreme Court decisions. White, struck down a specific prohibition which barred this type of campaign speech. In light of White, Opinion C-227 and its underlying opinions are valid and the opinion should stand.

Opinion C-237, March 1986

Ethics Opinion C-237, stated that a candidate for judicial office may publicly express an opinion on a ballot proposal. The judicial candidate in this opinion asked whether it was ethical to express an opinion on a ballot proposal that would allow capital punishment as a form of sentencing.

In light of the White, this opinion correctly held that Michigan does not have an "announce policy" prohibiting judges from expressing his or her views on disputed legal or political issues. Nor would such a prohibition be constitutionally valid. This opinion remains valid under White.

Opinion JI-004, May 19, 1989

Opinion JI-004 opined that a campaign advertisement for a judicial candidate in which the candidate pledged a portion of his judicial salary for charitable purposes was unethical and could not be used. The candidate also asserted that judicial salaries were too high. The opinion stated that such a statement was improper as being misleading and an unwarranted attack on the judiciary.

The opinion addressed prior MCJC 7 B (1)(c) which stated that a judicial candidate:

"(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; or misrepresent identity, qualifications, present position, or other fact."

The current Canon provides that a judicial candidate:

"(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;

(d) should not use or participate in the use of any form of public communication that the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a

material misrepresentation of fact or law or merits a fact necessary to make the statement considered as a whole not materially misleading, or which is likely to create an unjustified expectation about results the candidate can achieve.”

JI-004 addresses two separate issues. The first issue is the pledge of a portion of the candidate’s salary for charitable issues. Again, this slogan obviously reflects a “dated” campaign issue. Its relevance in a current race would be questionable. In light of *White*, and despite the fact that the candidate uses the word “pledge”, it would be difficult to construe this as an impermissible pledge or promise. The so-called “pledge” has nothing to do with the judge’s job duties, performance, or judicial decision-making process. It is a statement or announcement of intention of the candidate to dispose of his salary in a manner in which he feels is appropriate and which is completely lawful. As such, this must be considered constitutionally protected speech. The second issue is the statement that judicial salaries are too high. The mere statement or announcement of one’s opinion that judicial salaries are too high also does not rise to the level of a pledge or promise. Nor does this view represent a false or misleading statement or an unjust attack on incumbent judges. It is a statement of the candidate’s opinions and views. It is a matter of free speech expression that should be protected under the First Amendment. Accordingly, Opinion JI-004 is no longer valid under *White*.

Opinion JI-027

In Opinion JI-027, a judge asked whether he could ethically participate in forums or debates put on by public interest groups or the media. The opinion stated that a judicial candidate may participate in a public forum in the course of an election campaign, provided that the candidate does not create the impression that if elected or re-elected the candidate would act with bias or partiality towards a particular class or group. Opinion JI-027 remains valid under *White*, with the exception of its references to opinions C-219 and C-222 that were previously discussed.

Opinion JI-082

JI-082 opines that a judicial candidate must not respond to a survey questionnaire that elicits candidate’s opinions on matters pending or impending in any court. Under *White*, that opinion is invalid to the extent it would prohibit a candidate from responding to the type generic questions discussed in JI-082. The questions posed in the questionnaire do not elicit “pledges or promises”. Rather, the questionnaire asked for an expression of opinions held by the candidate. In addition, the candidate was not compelled to the questionnaire or answer any specific question.

Nothing in this opinion should be understood to state or imply that a candidate for judicial office may comment on any specific matter pending in the Court to which the candidate seeks election.

JUDICIAL TENURE COMMISSION OPINIONS
PERTAINING TO USAGES OF CAMPAIGN FUNDS

Judicial Tenure Commission Opinions

Pertaining to Usages of Campaign Funds

Advisory Opinion 56

September 12, 1984

Inquiry: Whether the treasurer for a committee to reelect a judge may repay a loan the judge made in connection with a previous election out of funds raised for the current campaign.

Opinion: MCJC 7B(2)(c) prohibits the repayment of a loan made by a judge in a previous campaign out of funds raised in a different campaign. Debts incurred from a previous election may not be paid with current campaign funds.

Advisory Opinion 66

April 16, 1986

Inquiry: Whether campaign funds may be used to pay members of a judge's family for work done on the campaign.

Opinion: Although MCJC 7B(2)(c) prohibits the use of campaign contributions for the private benefit of the judge or the judge's family, campaign funds can be used to compensate family members for work done on the campaign as long as the work done was necessary and the salary paid is commensurate with what others would be paid to do the same work. Funds used in this manner would not be for the "private benefit" of the judge's family members; rather, they would be used for the overall advancement of the campaign.

Advisory Opinion 71

October 23, 1986

Inquiry: (1) Whether after election day campaign funds may be used to pay campaign expenses such as copying costs and postage; (2) Whether campaign funds may be used to finance a post-election victory party.

Opinion: (1) MCJC 7B(2)(e) permits the payment of campaign expenses out of campaign funds as long as such expenses were incurred prior to the election. (2) Since a post-election party is not legitimate campaign expenditure incurred before the election, MCJC 7B(2)(e) prohibits the use of campaign funds to finance the function.

CODE OF JUDICIAL CONDUCT

Code of Judicial Conduct

The Michigan Supreme Court adopts the Code of Judicial Conduct, and the most recent version took effect in October 1993. From time to time, the Supreme Court effects changes in the Code, which was most recently done in September 2003. Canon 7B was amended to clarify that it applies to all candidates for judicial office, not just incumbent judges, and precludes a judicial campaign committee from accepting funds from another committee that was set up for that candidate in connection with an attempt to secure any other judicial or nonjudicial office. The amendment took effect January 1, 2004.

CANON 1

A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. A judge should always be aware that the judicial system is for the benefit of the litigant and the public, not the judiciary. The provisions of this code should be construed and applied to further those objectives.

[Amended effective October 1, 1993.]

CANON 2

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities

A. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

B. A judge should respect and observe the law. At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary. Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect.

C. A judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not use the prestige of office to advance personal business interests or those of others. A judge should not appear as a witness in a court proceeding unless subpoenaed.

D. A judge may respond to requests for personal references.

E. A judge should not allow activity as a member of an organization to cast doubt on the judge's ability to perform the function of the office in a manner consistent with the Michigan Code of Judicial Conduct, the laws of this state, and the Michigan and United States Constitutions. A judge should be particularly cautious with regard to membership activities that discriminate, or appear to discriminate, on the basis of race, gender, or other protected personal characteristic. Nothing in this paragraph should be interpreted to diminish a judge's right to the free exercise of religion.

[Amended effective October 1, 1993.]

CANON 3

A Judge Should Perform the Duties of

Office Impartially and Diligently The judicial duties of a judge take precedence over all other activities. Judicial duties include all the duties of office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

- (1) A judge should be faithful to the law and maintain professional competence in it. A judge should be unwayed by partisan interests, public clamor, or fear of criticism.
- (2) A judge may require lawyers, court personnel, and litigants to be appropriately attired for court and should enforce reasonable rules of conduct in the courtroom.
- (3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.
- (4) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows: (a) A judge may allow ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits, provided: (i) the judge reasonably believes that no party or counsel for a party will gain a procedural or tactical advantage as a result of the ex parte communication, and (ii) the judge makes provision promptly to notify all other parties and counsel for parties of the substance of the ex parte communication and allows an opportunity to respond. (b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. (c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges. (d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge. (e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.
- (5) A judge should dispose promptly of the business of the court.
- (6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require a similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court or the judge's holdings or actions.
- (7) A judge should prohibit broadcasting, televising, recording, or taking of photographs in or of the courtroom during sessions of court or recesses between sessions except as authorized by the Supreme Court. [FN*] FN* See Administrative Order 1990-7, Videotape Record of Court Proceedings, supra, which authorizes an exception to this paragraph.
- (8) A judge may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear up some obscurity, but the judge should bear in mind that undue interference, impatience, or participation in the examination of witnesses, or a severe attitude on the judge's part toward witnesses, especially those who are excited or terrified by the unusual circumstances of a trial, may tend to prevent the proper presentation of the cause, or the ascertainment of truth in respect thereto.
Conversation between the judge and counsel in court is often necessary, but the judge should be studious to avoid controversies that are apt to obscure the merits of the dispute between litigants and lead to its unjust disposition. In addressing counsel, litigants, or witnesses, the judge should avoid a controversial manner or tone. A judge

should avoid interruptions of counsel in their arguments except to clarify their positions, and should not be tempted to the unnecessary display of learning or a premature judgment.

(9) A judge should adopt the usual and accepted methods of doing justice, avoid the imposition of humiliating acts or discipline, not authorized by law in sentencing and endeavor to conform to a reasonable standard of punishment and not seek popularity or publicity either by exceptional severity or undue leniency.

(10) Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect. To the extent possible, a judge should require staff, court officials, and others who are subject to the judge's direction and control to provide such fair, courteous, and respectful treatment to persons who have contact with the court.

B. Administrative Responsibilities.

(1) A judge should diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should direct staff and court officials subject to the judge's control to observe high standards of fidelity, diligence, and courtesy to litigants, jurors, witnesses, lawyers, and others with whom they deal in their official capacity.

(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware. However, a judge is not obliged to take or initiate disciplinary measures on the basis of information gained while serving with the substance abuse counseling program of the State Bar of Michigan, to the extent the information would be protected under MRPC 1.6 from disclosure if it were a communication between lawyer and client.

(4) A judge should not cause unnecessary expense by making unnecessary appointments. All appointments shall be based upon merit.

(5) A judge should not approve compensation beyond the fair value of services rendered.

C. Disqualification. A judge should raise the issue of disqualification whenever the judge has cause to believe that grounds for disqualification may exist under MCR 2.003(B).

D. Remittal of Disqualification. A disqualification of a judge may be remitted as provided by MCR 2.003(D).

[Amended effective October 1, 1993; January 18, 1994; September 1, 1995.]

Staff Comment to 1994 Amendment The 1994 amendment of Canon 3.B(3) was proposed by the State Bar of Michigan. It was designed to parallel the language of MRPC 8.3(c)(2), and to help assure confidentiality for those seeking assistance in the Bar's substance-abuse counseling program.

Staff Comment to 1995 Amendment The July 7, 1995, amendments of MCR 2.003, and Rules 3A, 3D, 6C, and 7B of the Michigan Code of Judicial Conduct, and new MCR 9.227 and Rule 7D of the Michigan Code of Judicial Conduct, are based on the proposed revision of the Michigan Code of Judicial Conduct submitted by the State Bar Representative Assembly. See 442 Mich 1216 (1993). They are effective September 1, 1995.

CANON 4
**A Judge May Engage in Activities to Improve the Law,
The Legal System and the Administration of Justice**

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

A judge, subject to the proper performance of judicial duties, may engage in the following quasi-judicial activities:

A. A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

B. A judge may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and may otherwise consult with such executive or legislative body or official on such matters.

C. A judge may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A judge may assist such an organization in raising funds and may participate in their management and investment, but should not individually solicit funds. A judge may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

[Amended effective October 1, 1993.]

CANON 5
**A Judge Should Regulate Extra-Judicial Activities to
Minimize the Risk of Conflict With Judicial Duties**

A. Avocational Activities. A judge may write, lecture, teach, speak, and consult on nonlegal subjects, appear before public nonlegal bodies, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of the office or interfere with the performance of judicial duties.

B. Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee, or nonlegal advisor of a bona fide educational, religious, charitable, fraternal, or civic organization, subject to the following limitations: (1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court. (2) A judge should not individually solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of the office for that purpose, but may be listed as an officer, director, or trustee of such an organization. A judge may, however, join a general appeal on behalf of an educational, religious, charitable, or fraternal organization, or speak on behalf of such organization.

C. Financial Activities.

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality or judicial office, interfere with the proper performance of judicial duties, exploit the judicial position, or involve the judge in frequent

transactions with lawyers or persons likely to come before the court on which the judge serves.

(2) Subject to the requirements of C(1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not serve as director, officer, manager, advisor, or employee of any business. Provided, however, with respect to a judge holding office and serving as an officer, director, manager, advisor, or employee of any business not prohibited heretofore by law or judicial canon, the effective date of the prohibition contained herein shall be the date of expiration of the judge's current judicial term of office.

(3) A judge should manage investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as it can be done without serious financial detriment, the judge should dispose of investments and other financial interests that require frequent disqualification.

(4) Neither a judge nor a family member residing in the judge's household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) A judge may accept a gift or gifts not to exceed a total value of \$100, incident to a public testimonial; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice.

(b) A judge or a family member residing in the judge's household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants.

(c) A judge or a family member residing in the judge's household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before the judge, and, if its value exceeds \$100, the judge reports it in the same manner as compensation is reported in Canon 6C.

(5) For the purposes of this section, "family member residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a family member, who resides in the judge's household.

(6) A judge is not required by this code to disclose income, debts, or investments, except as provided in this canon and Canons 3 and 6.

(7) Information acquired by a judge in a judicial capacity should not be used or disclosed by the judge in financial dealings or for any other purpose not related to judicial duties.

D. Fiduciary Activities. A judge should not serve as an executor, administrator, testamentary trustee, or guardian, except for the estate, testamentary trust, or person of a member of the judge's immediate family, and then only if such service will not interfere with the proper performance of judicial duties. As a family fiduciary, a judge is subject to the following restrictions:

(1) A judge should not serve if it is likely that as such fiduciary the judge will be engaged in proceedings that would ordinarily come before the judge or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(2) While acting as such fiduciary, a judge is subject to the same restrictions on financial activities that apply in the judge's personal capacity.

E. Arbitration. A judge should not act as an arbitrator or mediator, except in the performance of judicial duties.

F. Practice of Law. A judge should not practice law for compensation except as otherwise provided by law.

G. Extra-Judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent the country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

[Amended effective October 1, 1993.]

CANON 6

A Judge Should Regularly File Reports of Compensation Received for Quasi-Judicial and Extra-Judicial Activities And of Monetary Contributions

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this code, if the source of such payments does not give the appearance of influencing the judge in judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

A. Compensation. Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

B. Expense Reimbursement. Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse. Any payment in excess of such an amount is compensation.

C. Public Reports. A judge shall report the date, place, and nature of any activity for which the judge received compensation, and the name of the payor and the amount of compensation so received. The judge's report shall be made at least annually and shall be filed as a public document in the office of the State Court Administrator or other office designated by law.

[Amended effective April 21, 1980; October 1, 1993; September 1, 1995.]

Staff Comment to 1995 Amendment The July 7, 1995, amendments of MCR 2.003, and Rules 3A, 3D, 6C, and 7B of the Michigan Code of Judicial Conduct, and new MCR 9.227 and Rule 7D of the Michigan Code of Judicial Conduct, are based on the proposed revision of the Michigan Code of Judicial Conduct submitted by the State Bar Representative Assembly. See 442 Mich 1216 (1993). They are effective September 1, 1995.

CANON 7

A Judge or a Candidate for Judicial Office Should Refrain From Political Activity Inappropriate to Judicial Office

A. Political Conduct in General.

(1) A judge or a candidate for judicial office should not:

- (a) hold any office in a political party;
- (b) make speeches on behalf of a political party or non-judicial candidate or publicly endorse a candidate for non-judicial office.

(2) A judge or candidate for judicial office may:

- (a) attend political gatherings;
- (b) speak to such gatherings on the judge's own behalf or on behalf of other judicial candidates;
- (c) contribute to a political party.

(3) A judge should resign the judicial office before becoming a candidate either in a party primary or in a general election for nonjudicial office.

B. Campaign Conduct.

(1) A candidate, including an incumbent judge, for a judicial office:

- (a) should maintain the dignity appropriate to judicial office, and should encourage family members to adhere to the same standards of political conduct that apply to the judge;
- (b) should prohibit public employees subject to the judge's direction or control from doing for the judge what the judge is prohibited from doing under this canon;
- (c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
- (d) should not knowingly, or with reckless disregard, use or participate in the use of any form of public communication that is false.

(2) These provisions govern a candidate, including an incumbent judge, for a judicial office:

- (a) A candidate should not personally solicit or accept campaign funds, or solicit publicly stated support by improper use of the judicial office in violation of B(1)(c). A candidate may send a thank-you note to a contributor.
- (b) A candidate may establish committees of responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statements of support for the candidacy.
- (c) Such committees are prohibited from soliciting campaign contributions from lawyers in excess of \$100 per lawyer, but may solicit public support from lawyers. It is not a violation of this provision for a committee, in undertaking solicitations that are not directed exclusively to lawyers but may in fact go to lawyers who are members of a group or found on a mailing list, to solicit more than \$100 per person, provided that the following disclaimer appears on the letter or on a response card, in print that is at least the same size as the remainder of the print in the letter or the response card: "Canon 7 of the Michigan Code of Judicial Conduct prohibits a judicial campaign committee from soliciting more than \$100 per lawyer. If you are a lawyer, please regard this as informative and not a solicitation for more than \$100."

(d) A candidate's committee may not directly or indirectly accept funds from any committee that was established in connection with the candidate's attempt to secure any other judicial or nonjudicial office. The committee may solicit funds for the campaign no earlier than February 15 of the year of the election, and may not solicit or accept funds after the date of the general election.

(e) A candidate should not use or permit the use of campaign contributions for the private benefit of the candidate or the candidate's family.

(f) If a candidate is not opposed for such judicial office, the candidate or the candidate's committee shall return to the contributors funds raised in excess of the actual costs incurred or contribute such funds to the client security fund of the State Bar of Michigan, not later than January 1 following the election. Likewise, any candidate or committee having funds remaining after payment of all campaign expenses shall either return such funds to the contributors thereof or donate the funds to the client security fund of the State Bar of Michigan, not later than January 1 following the election.

(g) A candidate for judicial office may not pay an endorsing organization for its ranking or endorsement. However, a candidate for judicial office may contribute campaign funds to pay some of the costs associated with the publication of the endorsement or ranking of the candidate, provided the candidate secures from the endorsing organization an assurance, before the endorsement or ranking is made, that the endorsing organization will not:

(i) demand payment from the candidate or the candidate's agent as a condition of the endorsement or favorable ranking,

(ii) seek any assurance from the candidate before the endorsement or ranking is made that it will be paid if it endorses or ranks the candidate favorably,

(iii) add an endorsement or favorable ranking of a different candidate in the event that the initially supported candidate decides not to pay the endorsing organization for publicizing its endorsement and favorable ranking,

(iv) prevent the candidate from publicizing the endorsement or favorable ranking independent of the endorsing organization, regardless of whether the endorsing organization itself publicizes its endorsement or favorable ranking.

(3) No judge should personally sell or permit any court or public employee working for or assigned to any court to sell fund-raising tickets or accept contributions of any kind on the judge's behalf or on behalf of any other judicial candidate.

C. Fund Raising Other Than for Campaign Purposes Prohibited. Except as provided in 7B(2)(b), (c),

(1) No judge shall accept a testimonial occasion on the judge's behalf where the tickets are priced to cover more than the reasonable costs thereof, which may include only a nominal gift,

(2) No judge or other person, party, committee, organization, firm, group or entity may accept any contribution of money or of a tangible thing of value, directly or indirectly, to or for a judge's benefit for any purpose whatever, including, but not limited to, contribution for a campaign deficit, expenses associated with judicial office, testimonial, honorarium (other than for services, subject to Canon 6) or otherwise.

D. Applicability.

(1) A successful candidate, whether or not an incumbent, and an unsuccessful candidate who is a judge, are subject to judicial discipline for campaign misconduct. An unsuccessful candidate who is a lawyer is subject to lawyer discipline for judicial campaign misconduct.

(2) A successful elected candidate who was not an incumbent has until midnight December 31 following the election to wind up the candidate's law practice, and has until June 30 following the election to resign from organizations and activities, and divest interests that do not qualify under Canon 4 or 5.

(3) Upon notice of appointment to judicial office, a candidate shall wind up the candidate's law practice prior to taking office, and has six months from the date of taking office to resign from organizations and activities and divest interests that do not qualify under Canon 4 or 5.

[Amended effective October 1, 1993; September 1, 1995; January 1, 2000.]

Staff Comment to 1995 Amendment The July 7, 1995, amendments of MCR 2.003, and Rules 3A, 3D, 6C, and 7B of the Michigan Code of Judicial Conduct, and new MCR 9.227 and Rule 7D of the Michigan Code of Judicial Conduct, are based on the proposed revision of the Michigan Code of Judicial Conduct submitted by the State Bar Representative Assembly. See 442 Mich 1216 (1993). They are effective September 1, 1995.

Staff Comment to 1999 Amendment With regard to the December 28, 1999 amendment of Canon 7B(2)(a), effective January 1, 2000, both the Michigan Judges Association and the State Bar of Michigan Standing Committee on Professional and Judicial Ethics supported this clarification concerning thank-you notes. Further, several witnesses at the Supreme Court's public hearings questioned how a simple expression of common courtesy could be unethical. As attorney John Felton stated during the hearing on November 4, 1999, in Gaylord: "One other comment, if I might, with respect to thank you notes. Having donated to campaigns, and I know I have talked to other lawyers that donate to campaigns, I just can't conceive of how the good manners our mother taught us would lead to bad ethics. So I think it's perfectly appropriate, and I don't think as a lawyer I would draw any inference from a judge thanking a lawyer for a contribution." The Court considered concerns expressed by some members of the State Bar Representative Assembly that a thank-you note might circumvent the intent of the code to prohibit a candidate's personal involvement in fund-raising, but was persuaded that the requirement of the Michigan Campaign Finance Act, 1976 PA 388, that judicial candidates verify the truth of campaign finance statements that list contributors, MCL 169.237; MSA 4.1703(37), effectively negates that concern. The reference in the proposed rule that would have allowed "other acknowledgments" was not adopted. With regard to Canon 7B(2)(c), the \$100 limitation concerning solicitation of lawyers had been the rule since 1974. If adjusted for inflation, the amount would have been in excess of \$300. Nevertheless, the Court declined to raise the amount judicial candidate committees may solicit from lawyers from \$100 to \$300 for the year 2000 judicial elections. The Court explained, however, that its duty to keep its rules in compliance with the United States Supreme Court's understanding of First Amendment law concerning free speech and rights of association might require it to revisit this question after the United States Supreme Court decides *Shrink Missouri Government PAC v Nixon*, 161 F3d 519 (CA 8, 1998) cert granted 119 S Ct 901; 142 L Ed 2d 901 (1999), because that case involves a constitutional challenge to limits on contributions that have not been raised for many years to account for the effects of inflation. The Court adopted language in Canon 7B(2)(c) allowing for a disclaimer in solicitation letters in excess of \$100 that may inadvertently be sent to lawyers because it is virtually impossible for a candidate to assure that a solicitation sent to any group believed to consist primarily of nonlawyers will not include at least one lawyer. With regard to Canon 7B(2)(d)-(f), the Court established a fixed date that made clear to the public and to candidate committees, when fund-raising may begin, eliminating the need to count backwards 180 days from the date of the primary election or the varying dates of the parties' nominating conventions in order to arrive at the applicable date. As the Court had no desire to increase the length of time for fund-raising, it chose February 15 as the starting date, a change that has the effect of decreasing the amount of time available for fund-raising, given the historic practice of

using the primary election date as the applicable date from which to count back. The Court rejected the proposal to allow solicitation or acceptance of funds up to 45 days after the general election because of comments suggesting that such a rule could lead to abuses and the appearance of impropriety. Parts of Canon 7B(2)(d)-(f) also were restructured. The December 28, 1999 amendment of Canon 7C, effective January 1, 2000, eliminated obsolete language pertaining to campaign year 1974.

Staff Comment to 2000 Amendment The March 30, 2000 amendment of Canon 7B(1) is explained in *In re Chmura*, 461 Mich 517; [517]; [608] NW2d [31] (2000).

Staff Comment to 2004 Amendment The September 30, 2003 amendment of Canon 7B(2)(a) and (b), effective January 1, 2004, clarified that Canon 7B applies to all candidates for judicial office, not just incumbent judges. The amendment of Canon 7B(2)(d) precludes a judicial campaign committee from accepting funds from another committee that was set up for that candidate in connection with an attempt to secure any other judicial or nonjudicial office. Although Canon 7B(2) prohibits judicial campaign committees from raising funds before February 15 of an election year and from soliciting more than \$100 per individual lawyer, these provisions potentially could have been evaded under the previous version of 7B(2)(d). For example, the rule did not expressly preclude the transfer to a judicial campaign committee of funds solicited before February 15 of an election year for a nonjudicial campaign. Nor did it expressly prohibit the transfer of a contribution solicited from an individual lawyer for a nonjudicial campaign to a subsequently established judicial committee for that same candidate. In that situation, the lawyer might have contributed \$500 to the nonjudicial campaign, more than the judicial campaign committee could solicit, and the judicial campaign committee then could solicit a new, direct \$100 contribution from the lawyer. The amendment eliminated these flaws, as well as potential violations of the contribution limits set by the Michigan Campaign Finance Act, MCL 169.201 *et seq.*

CANON 8

Collective Activity By Judges

The canons of this Code concerning the conduct of individual judges and judicial candidates also apply to judges' associations or any other organization consisting exclusively of judges.

[Adopted Effective January 1, 2000.]

1999 Staff Comment The addition of Canon 8 on December 28, 1999, effective January 1, 2000, clarified that judges remain accountable for their actions under the Code of Judicial Conduct when acting collectively in concert with other judges.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.